PCA CASE NO. 2016-7

In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With The Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of The Republic Of India For The Promotion And Protection Of Investments

-and-

The Arbitration Rules Of The United Nations Commission On International Trade Law, 1976 (the "UNCITRAL Arbitration Rules")

-between-

CAIRN ENERGY PLC
CAIRN UK HOLDINGS LIMITED

Claimants

-and-

The Republic of India

Respondent

Procedural Order No. 16

The Arbitral Tribunal
Dr. Laurent Lévy (Presiding Arbitrator)
Prof. Stanimir A. Alexandrov
Mr. J. Christopher Thomas QC

Secretary of the Tribunal
Ms. Sabina Sacco

Registry
Permanent Court of Arbitration

18 March 2019

I. SCOPE OF THIS ORDER

1. The present Order addresses the Claimants' Application for an order from the Tribunal, made through CCom-286, as amended by CCom-288 (the "Claimants' Application").

II. PROCEDURAL BACKGROUND

2. Through RCom-335 of 15 December 2018, the Respondent applied for permission to adduce certain materials from the present proceedings in the appeal filed by the Income Tax Department ("ITD") before the Delhi High Court regarding the Order of the Income Tax Appellate Tribunal ("ITAT") of 9 March 2017 (the "ITAT Order", Exh. C-228) (the "Respondent's Application"). Specifically, the Respondent requested permission to adduce the following documents (the "Documents") in the Delhi High Court proceedings, as further detailed in the index attached to RCom-335:

   a. Ms. Janice Brown's three witness statements;

   b. All of the exhibits attached to Ms. Brown's witness statements;

   c. The pages of the transcript of the evidentiary hearing recording Ms. Brown's oral testimony (direct and cross-examination) (specifically, Day 4, pp. 138 – 250 and Day 5, pp. 2-277); and

   d. Documents used during Ms. Brown's cross-examination.

3. In total, the Respondent wished to adduce 263 documents from these proceedings in the Delhi High Court proceedings. The Respondent stated that these Documents "relate[d]" to a hearing in the Delhi High Court proceedings scheduled for 9 January 2019.[1]

4. The Respondent clarified that it was "seeking the Tribunal's permission to adduce this material before the Delhi High Court *ex abundanti cautela*, noting that Dutch law, as the law of the seat, does not impose any requirement of confidentiality".[2] The Respondent also submitted that the disclosure of this material for the purposes of court proceedings would not constitute "publication" of the Documents for purposes of para. 59(c) of Procedural Order No 2 ("PO2"),[3] and alternatively requested for a limited variation of that paragraph to allow the use of the Documents before the Delhi High Court. The Respondent emphasized that it was prepared to work with the Claimants to find ways to ensure that the Documents were kept confidential in the Delhi High Court proceedings

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1 RCom-335, ¶ 1.

2 RCom-335, ¶ 4.

3 At para. 59(c) of PO2, the Tribunal "ORDER[ED] that neither Party shall make public, in part or in whole, any other document submitted, produced or created in connection with this proceeding, including but not limited to procedural correspondence, the Notice of Dispute, the Notice of Arbitration, the Statement of Claim, the Statement of Defence, any other written submissions by the Parties, any transcripts of hearings, any and all witness statements, expert reports, or documentary exhibits."

(such as keeping the documents and written submissions under seal, and for court proceedings to be held *in camera*).[4]

5. The Claimants objected to this request through CCom-275 of 28 December 2018. Essentially, the Claimants argued that the applicable procedural framework did not permit the disclosure of the Documents in other proceedings, and that a variation from the regime adopted in PO2 was not justified here. They also contended that there was no urgency to the Respondent's Application, that the Application was unsupported by compelling reasons; was overbroad, one-sided, an abuse of process and sought to sidestep the normal operation of the Respondent's sovereign powers.

6. The Respondent replied to this submission through RCom-345 of 4 January 2019. This submission contained the Respondent's reply to the Claimants' objections to the Respondent's Application, as well as certain comments on the merits of the case arising from examples given by the Claimants in the context of their argument that the application was one-sided.

7. Through CCom-276 of the same date, the Claimants requested an opportunity to rejoin to RCom-345 (which they described as an unauthorized submission), arguing inter alia that it was 16 pages long and covered a number of merits topics. However, noting that the Delhi hearing was scheduled for 7 January 2019, and not 9 January 2019, they first requested "as a matter of urgency that the Tribunal direct the Respondent that it will not seek to introduce the confidential documents into the Delhi High Court proceedings whilst the Claimants have not had a full and fair opportunity to address the Respondent's new arguments and before the Tribunal has had sufficient time to issue a reasoned decision on the dispute."[5]

8. Through RCom-346 of 5 January 2019, the Respondent objected to CCom-276 on matters of procedure. It also confirmed that the Delhi hearing was on Monday 7 January and not on Wednesday 9 January, and stated that, as a result, "it [was] unclear to what extent the Respondent [would] in fact be in a position to move the court for admission of the abuse documents at this hearing" noting that it would "keep the Tribunal updated as to developments."[6]

9. Through CCom-277 of 6 January 2019, the Claimants responded to RCom-346. In particular, they reiterated their request to respond to the Respondent's "untimely merits submissions" in RCom-345, as well as their request "that the Tribunal either reject the Respondent's request for leave to introduce the confidential documents into the Delhi High Court proceedings, or direct the Respondent not to introduce them until this matter can be fully briefed and the Tribunal has had occasion to issue a reasoned decision."[7]

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4 RCom-335, ¶ 5.

5 CCom-276.

6 RCom-346, ¶ 4.

7 CCom-227.

10. Through RCom-347 of the same date, the Respondent responded to CCom-277. In particular, it stated that (i) there was no basis for disregarding RCom-345 or for any further response by the Claimants, but if the Claimants were allowed to make further submissions, it reserved a final right of reply on its application; (ii) that "the question of whether the documents will be admitted before the Delhi High Court will be one for the Delhi High Court – and for no other body – to make", and (iii) in light of the mistake made on the hearing date, it was unlikely that the Respondent would be in a position to request the admission of the Documents at the hearing.[8]

11. Also on 6 January 2019, the Tribunal issued AT-272, which provided as follows:

> "The Tribunal has thus several applications before it and considers it necessary to make the following rulings at this juncture.
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> A. With respect to the briefing procedure for this application, the Tribunal makes the following comments and gives the following directions:
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> 1. RCom-345 was an unauthorized submission; the Tribunal did not invite the Respondent to make further comments on this matter. That being said, the Respondent did give advance notice that it intended to file it. Rather than determining whether RCom-345 should be declared inadmissible, the Tribunal will consider its merits.
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> 2. The consistent procedure in this arbitration has been that each side has had an equal opportunity to make submissions on each matter. Thus, any reply by a party making an application must be followed by an opportunity for the other party to rejoin, in particular if the applicant's reply was substantive in nature as the Claimants argue, including in Ccom-277. Here, the Respondent has filed a 16-page submission touching upon various matters. The Claimants must be given an opportunity to respond.
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> 3. The Parties now appear to agree that the Delhi hearing is scheduled for Monday 7 January 2019, and not Wednesday 9 January. The Tribunal notes that the Claimants had already indicated this in CCom-275,which the Claimants recall in CCom-277.
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> 4. The briefing on this matter will therefore not be completed before the Delhi hearing, nor will the Tribunal be in a position to issue its final ruling. However, given the Respondent's statement that it might not be in a position to make its application before the Delhi High Court on Monday, the matter may have lost some urgency. The Tribunal requests the Respondent to indicate within three days, i.e. on or before Wednesday 9 January, when it intends to apply to the Delhi High Court for the introduction of these documents.
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> 5. On that basis, the Tribunal will provide the Claimants with an opportunity to respond to RCom-345.

[8] RCom-347.

6. That being said, the Tribunal also considers that the Respondent's request is premature. The Parties appear to agree that the Delhi High Court must expressly allow the Respondent to file any new evidence. If the Delhi High Court does not allow this, then the Respondent's application will have been moot and the Parties and the Tribunal would have spent time and resources on an unnecessary application. Hence, unless and until the Delhi High Court rules that the Documents are admissible in its proceedings, the Respondent's application is premature, For the avoidance of doubt, it is clarified that the Tribunal is aware of the Respondent's position that its application should not be necessary; the Respondent's position is that it would be for the Delhi High Court to decide whether to admit relevant documents into its record and that its application is made only "*ex abundante cautela*"; this is a possible issue on which the Tribunal does not make any determination at this juncture. The Tribunal is also aware that the Claimants have requested it to direct the Respondent that it cannot seek to introduce the Documents in the Delhi proceedings. The Tribunal refrains from preventing the Respondent from making an application to the Delhi High Court; however, as further explained in Section B below, the Tribunal insists that it has the authority to deny the Respondent permission to use the Documents outside of these arbitral proceedings. For reasons of procedural economy, the Tribunal considers that it would be preferable for the Respondent first to apply to the Delhi High Court to admit the Documents, without adducing them, and only once the Delhi High Court has declared that they are admissible, seek this Tribunal's permission to adduce them.

B. The Respondent's application seems to have lost some of its urgency; however, this may not be fully clear. Indeed, in RCom-345 the Respondent appeared to be suggesting that, at the (Delhi) hearing, it would request the Delhi High Court to admit the Documents regardless of what this Tribunal has to say on the matter, or at the very least, that it would not object to the Tribunal refraining from issuing an order on its application so that the Delhi High Court can rule on the admissibility of the Documents "without any hindrance (or perceived support […]) from this Tribunal" (RCom-345, ¶ 11). On this basis, the Claimants have requested the Tribunal as a matter of urgency to direct the Respondent not to seek to introduce the Documents into the Delhi High Court proceedings before the briefing on this matter is finalized and the Tribunal has had sufficient time to issue a reasoned decision on this matter.

Given the uncertainty of the Respondent's position, the fact that the Delhi hearing is on Monday, and the interests at stake, the Tribunal considers it necessary to make the following provisional ruling:

1. Pursuant to para. 7.1 of the Terms of Appointment, this proceeding is governed by (i) the Terms of Appointment, Procedural Order No. 1 and any amendments; (ii) the UNCITRAL Arbitration Rules (1976), and (iii) with respect to matters not dealt with in these instruments, by the agreement of the parties or, absent agreement, the Tribunal's procedural orders. While not expressly stated in the Terms of Appointment, these proceedings are also governed by the

mandatory rules of the *lex arbitri*, i.e. the Dutch Arbitration Act contained in the Dutch Code of Civil Procedure (Article 1(2) of the UNCITRAL Rules).

2. As noted in Procedural Order No. 2 ("PO2"), there are few rules governing transparency or confidentiality in the UNCITRAL Rules, and no rule (let alone a mandatory one) in the Dutch Arbitration Act. Absent agreement between the Parties, it is for the Tribunal to set out the regime on confidentiality and transparency that it considers appropriate, subject to the UNCITRAL Rules and in particular Article 15(1). The Tribunal exercised this power in PO2, which sets out the applicable regime on transparency and confidentiality in this arbitration.

3. PO2 is binding on the Parties. This flows from para. 7.1 of the ToA, and Articles 1 and 15(1) of the UNCITRAL Rules.

4. It is unclear to the Tribunal whether the Respondent plans already to adduce the Documents at the Delhi hearing, or simply to seek the court's leave to adduce them at a later date. It is of course for the Delhi High Court to decide whether evidence is admissible in its own proceedings. However, in this arbitration, absent a mandatory rule of the seat, or a clear rule in the instruments noted at para. 1, or an agreement of the Parties, it is for this Tribunal to determine whether evidence adduced in these arbitral proceedings can be used outside of these proceedings. This is particularly so when the Tribunal has set out in PO2 a regime of confidentiality and transparency that is binding on the Parties.

5. At para. 59(c) of PO2, the Tribunal "ORDER[ED] that neither Party shall make public, in part or in whole, any other document submitted, produced or created in connection with this proceeding, including but not limited to procedural correspondence, the Notice of Dispute, the Notice of Arbitration, the Statement of Claim, the Statement of Defence, any other written submissions by the Parties, any transcripts of hearings, any and all witness statements, expert reports, or documentary exhibits." The Respondent denies that its request to adduce the Documents in the Delhi High Court proceedings entails their "publication" (in particular if measures to protect their confidentiality are adopted), while the Claimants assert that it would make these documents publicly available in violation of PO2, and that no confidentiality measures have been adopted at this stage.

6. The proper interpretation of PO2 is still being considered by the Tribunal, among other points, and as noted above the Tribunal is not in a position to issue a final ruling on this matter. At this juncture and without considering in detail RCom-345 which the Claimants have not had an opportunity to respond/rejoin to **the Tribunal provisionally rules that para. 59(2) of PO2[9] prevents the Parties from disclosing to any third party (including a court of law) any materials or evidence adduced in this arbitration without**

[9] The Tribunal notes that the correct reference should have been para. 59(c) of PO2, as is clear from para. A.5 of AT-272.

> **express consent from the other Party or an order of the Tribunal derogating from PO2.**
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> 7. The Tribunal will reconsider this provisional ruling after the Claimants have had an opportunity to respond/rejoin to RCom-345.

12. Through RCom-349 of 9 January 2019, the Respondent informed the Tribunal that at the hearing of 7 January 2019, the Delhi High Court had adjourned the hearing of the ITD's amendment application to 15 March 2019. The Respondent's counsel team were thus awaiting instructions as to next steps, also taking into account the Tribunal's comments at para. A.6 of AT-272 as to the prematurity of the Respondent's Application, and accordingly requested an extension until 11 January 2019 to respond to para. A.4 of AT-272. The Respondent otherwise reserved its rights with respect to AT-272. Through AT-273 of 10 January, the Tribunal granted the requested extension. Through RCom-350 of 11 January 2019, the Respondent requested a further extension until 14 January 2019, to which the Claimants did not object.

13. Through RCom-351 of 14 January 2019, the Respondent informed the Tribunal that counsel had been instructed that "– as a matter of Indian procedure – there [would] be no need to apply to the Delhi High Court for the introduction of the abuse documents until after the ITD's amendment application has been determined, i.e. until after 15 March 2019."[10] As a result, and bearing in mind the Tribunal's statement at para. A.6 of AT-272 that "*[f]or reasons of procedural economy, the Tribunal considers that it would be preferable for the Respondent first to apply to the Delhi High Court to admit the Documents, without adducing them, and only once the Delhi High Court has declared that they are admissible, seek this Tribunal's permission to adduce them*", the Respondent formally withdrew "for now" its Application.[11] The Respondent reiterated however that this Application had been "made *ex abundante cautela* and entirely without prejudice to the Respondent's position that it may file these documents as of right in the Delhi High Court proceedings, subject only to the permission and control of the Delhi High Court."[12] The Respondent added that it would thus not fully respond to "the tentative comments made (on a necessarily speedy basis) by the Tribunal in AT-272 (as to which the Respondent's position remains reserved in full)," but reiterated for the record its position as to the distinction to be drawn between this arbitration's confidentiality regime and the regime governing the admission of documents from an arbitration into the proceedings of a national court. The Respondent stated that it would await the outcome the Delhi High Court hearing scheduled for 15 March 2019 and would keep the Tribunal updated in this respect.

14. Through AT-274 of 16 January 2019, the Tribunal took note of the withdrawal of the Respondent's Application and invited the Claimants to comment on RCom-251.

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[10] RCom-351.

[11] *Ibid*.

[12] *Ibid*.

15. Through CCom-280 of 25 January 2019, the Claimants submitted their comments to RCom-251. In particular, they stated that "the Respondent's formal withdrawal of its application before this Tribunal, coupled with its repeated assertions that the ITD 'may file these document as of right in the Delhi High Court proceedings, subject only to the permission and control of the Delhi High Court', give cause for concern."[13] Under the circumstances, they requested that "the Respondent confirm that the ITD will not file documents obtained in the arbitration in the domestic tax proceedings, absent leave of the Tribunal."[14] The Claimants also commented on the Respondent's position as to its right to adduce documents before the Delhi High Court, and submitted comments on the reasons for the adjournment of the hearing (specifically, they alleged that that the ITD had misrepresented to the Delhi High Court that the parties had agreed to an adjournment of the hearing). Finally, with respect to the merits submissions made by the Respondent in RCom-345, the Claimants sought "confirmation that those submissions are no longer part of the record in light of the Respondent's withdrawal of its application."[15]

16. Through RCom-360 of 28 January 2019, the Respondent commented on CCom-280.

    a. With respect to the Claimants' request that "*the Respondent confirm that the ITD will not file documents obtained in the arbitration in the domestic tax proceedings, absent leave of the Tribunal*", the Respondent reiterated its position that "it does not require leave from the Tribunal (as opposed to leave from the Delhi High Court)", noting that in any event it had already indicated that it would await the outcome of the 15 March 2019 hearing before proceeding further and would keep the Tribunal updated in that respect.[16] However, if the Tribunal was prepared to entertain the Claimants' application, the Respondent requested an opportunity to respond (and, if necessary, rejoin) to that application.

    b. The Respondent stated that it had no objection to the Claimants' request that the Respondent's submissions regarding its withdrawn application be considered as "no longer part of the record", provided that the Claimants' own submissions on that application, which also raised merits points, also be stricken from the record.

17. Through CCom-284 of 29 January 2019, the Claimants submitted two letters from CUHL's Indian counsel on the reasons for the adjournment of the hearing before the Delhi High Court, and requested leave to comment on RCom-360 by 8 February 2019.

18. Through RCom-361 of 1 February 2019, the Respondent responded to CCom-284. In particular, it objected to the letters filed by the Claimants, and reiterated its position that it should be allowed to respond to any application filed by the Claimants as per the procedure set out in para. A.2 of AT-272.

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[13] CCom-280.

[14] *Ibid*.

[15] *Ibid*.

[16] RCom-260.

19. On 1 February 2019, the Tribunal issued AT-279, which it immediately replaced with AT-279A to take into account RCom-361, and gave the following directions:

    a. With respect to the Claimants' request at CCom-280 that the Tribunal ask the Respondent to confirm "that the ITD will not file documents obtained in the arbitration in the domestic tax proceedings, absent leave of the Tribunal", the Tribunal noted the Parties' positions and respective requests in RCom-360 and CCom-284, and granted the Claimants leave to respond to RCom-360 by 8 February 2019, noting that they could include in that submission their response to RCom-361. The Tribunal also noted that it understood that the Claimants' request at CCom-280 was subject to the Claimants' impending response to RCom-360, and would not rule upon it (or on the Respondent's request for leave to respond to CCom-280) until it had been confirmed by the Claimants.

    b. With respect to the Claimants' allegation at CCom-280 and CCom-284 that the ITD misrepresented to the Delhi High Court that the parties had agreed to an adjournment of the hearing, the Tribunal invited the Respondent to comment within one week, unless its comments had already been submitted via RCom-361.

    c. With respect to the Parties' submissions on the merits of this case made in the context of the Respondent's Application, the Tribunal noted the Parties' agreement that these should be stricken from the record. It thus confirmed that any merits submissions made in RCom-335, CCom-275, RCom-345, CCom-276, RCom-346, CCom-277, RCom-347, RCom-351, CCom-280, RCom-360 and CCom-284 were stricken from the record and would be disregarded.

20. On 8 February 2019, the Claimants requested an extension to file their response to RCom-360, which the Tribunal granted subject to any objection from the Respondent. Through RCom-362 of 11 February 2019, the Respondent stated that it had no objection, but noted that this request suggested the filing of a full application, and that its counsel team would have limited availability to brief such an application in the coming weeks. The Respondent reiterated that "following the Tribunal's indications of its views as to 'prematurity' in communication AT-272, it will now await the outcome of the March 2019 hearing before proceeding further, and that it will keep the Tribunal updated in that respect."[17]

21. Through CCom-286 of 11 February 2019, the Claimants wrote "to seek a Tribunal order in view of the Respondent's refusal in RCom-360 to confirm that it will comply with the Tribunal's provisional ruling in AT-272" (the "Claimants' Application").[18] Specifically, the Claimants requested:

    a. As principal relief, that the Tribunal, by means of a procedural order:

        i. "Admit Annex A onto the record as the Claimants' response to RCom-345;"

[17] RCom-362.

[18] CCom-286, ¶ 1.

ii. "Finally declare that the Parties may not disclose to any third party (including a court of law) any materials or evidence adduced in this arbitration without express consent from the other Party or an order of the Tribunal derogating from this requirement, and order the Parties not to do so; and"

iii. "Find that the Respondent has not established a basis for derogating from its confidentiality obligations with respect to the use of the 263 documents listed in the index attached to RCom-335 in its domestic tax proceedings, and order the Respondent not to do so."[19]

b. In the alternative, the Tribunal, by means of a procedural order:

i. "Provisionally rule that the Parties may not disclose to any third party (including a court of law) any materials or evidence adduced in this arbitration without express consent from the other Party or an order of the Tribunal derogating from this requirement;"

ii. "Order the Parties not to disclose such materials or evidence to any third party (including a court of law) unless and until the Tribunal has reconsidered its provisional ruling or otherwise authorised the Party to derogate from this requirement; and

iii. "Declare that, if a Party wishes to introduce non-public materials or evidence adduced in the arbitration in other proceedings, it must first obtain a declaration from the other court or tribunal that the materials or evidence are admissible in those proceedings, and then seek the leave of this Tribunal to adduce the documents, and that, until such leave has been granted, the requesting Party may not introduce the documents in the other proceedings."[20]

22. Through AT-282 of 13 February 2019, the Tribunal invited the Respondent to comment on CCom-286 (but not on Annex A) by 20 February 2019. In the meantime, the Tribunal confirmed and repeated the contents of AT-272, which it considered to be binding on the Parties. The Tribunal further requested the Respondent to confirm by the same date "that it intends to comply with the sequence of steps set out in para. A.6 of AT-272 (specifically, whether it intends 'first to apply to the Delhi High Court to admit the Documents, without adducing them, and only once the Delhi High Court has declared that they are admissible, seek this Tribunal's permission to adduce them')."[21]

23. Through RCom-365 of 22 February 2019 (after an extension request which was granted), the Respondent submitted its response to CCom-286, requesting that both of the Claimants' applications should be denied. In addition:

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[19] *Id.*, ¶ 18.

[20] *Id.*, ¶ 19.

[21] AT-282.

a. The Respondent confirmed that it intended to comply with the sequence of steps set out in para. A.6 of AT-272, with one reservation. The Respondent explained that, when applying to the Delhi High Court to introduce the Documents into the record of the proceedings before that court (application which it would not make before the hearing scheduled for 19 March 2019), the Documents would be produced under a sealed cover together with the application for permission to adduce them into the record. The Respondent stated that the Claimant would be on notice of that application and would have the opportunity to oppose it. Given that this process would take time, and that, given the Tribunal's ruling on prematurity in AT-272, it would only be at that juncture that the question of any permission from the Tribunal would arise. The Respondent added that "[a]s for how the question will come back to the Tribunal at that juncture (if it does), the Respondent has always been clear that it is its position that it does not require permission from the Tribunal to adduce documents from this arbitration into Court proceedings which have their own rules governing their own processes; and – if the Claimants wish to restrain use at that juncture – it will be for them to make an application to that effect."[22]

b. The Respondent also insisted that it had formally withdrawn its Application and, as a result, "there was no live application before the Tribunal".[23] The Respondent explained that the reason for that withdrawal was the Tribunal's ruling as to prematurity in AT-272."[24]

24. Through CCom-288 of 1 March 2019, the Claimants replied to RCom-365. In particular:

a. The Claimants submitted that, while the Respondent professed an intention to comply with AT-272 subject to one reservation, in reality that reservation amounted to "a flat rejection of the Tribunal's direction."[25] The Claimants noted that, because the Respondent intends to produce the Documents into the Delhi High Court's registry under a sealed cover, the Document would automatically become part of the judicial record if the ITD's application is granted. The Respondent thus intends to deprive the Tribunal of an opportunity to rule on the disclosure of the Documents outside of this arbitration before they are put before the Delhi High Court. In the Claimants' view, "[t]his is the very definition of a *fait accompli*."[26]

b. The Claimants found it "deeply troubling […] that the Respondent persists in rejecting the Tribunal's authority over the Arbitration Documents, and insists it will adopt a procedure intended to preclude the Tribunal from ruling on the use of the [Documents] outside of these arbitral proceedings."[27]

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[22] RCom-365, ¶ 6(e).

[23] RCom-365, ¶ 7.

[24] RCom-365, ¶ 8.

[25] CCom-288, ¶ 2.

[26] *Id.*, ¶ 3.

[27] *Id.*, ¶ 6.

c. For these reasons, the Claimants request the following amended relief: that the Tribunal, by means of a procedural order:

i. "Admit **Annex A** to CCom-286 onto the record as the Claimants' response to RCom-345;"

ii. "Finally declare that the Parties may not disclose to any body external to the arbitral procedure (whether or not under seal) any materials or evidence adduced in this arbitration without express consent from the other Party or an order of the Tribunal derogating from this requirement, and order the Parties not to do so;" and

iii. "Find that the Respondent has not established a basis for derogating from its confidentiality obligations with respect to the use of the 263 documents listed in the index attached to RCom-335 in its domestic tax proceedings, and order the Respondent not to do so."[28]

25. Through RCom-368 of 6 March 2019, the Respondent submitted its rejoinder to CCom-286, and requested the Tribunal to dismiss the Claimants' Application(s), as modified in CCom-288. The Respondent further alleged that "[t]he 'sealed cover' procedure is the normal one by which applications for the admissibility of documents are made before an Indian Court", and reiterated that the Claimants would be able to approach the Tribunal to seek an order restraining their use if and when the documents are declared to be admissible by the Delhi High Court.[29] In this connection, the Respondent indicated that it would have no objection to the Tribunal putting in place directions which:

a. "Will ensure that the Claimants will not be in a position to represent to the Delhi High Court that the Tribunal has reached a decision either way as to the Respondent's right to use the documents before the Delhi High Court and will leave that Court free to reach its own decision as to admissibility without interference either way from the arbitral proceedings;" and/or

b. "Will put in place a period (say two months, or such other period as the Tribunal thinks fit) during which the documents will not be used in the Delhi High Court following their being declared admissible in principle by the Delhi High Court so as to leave enough time for any application by the Claimants to be briefed and determined."[30]

26. With this background, the Tribunal now turns to the Claimants' Application.

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[28] *Id.*, ¶ 10.

[29] *Id.*, ¶ 3(c)

[30] *Id.*, ¶ 6.

III. ANALYSIS

A. Preliminary considerations

27. The Tribunal starts by recalling that the Respondent has withdrawn its Application to adduce the Documents before the Delhi High Court. Consequently, as a procedural matter this Application is no longer "live" before the Tribunal.

28. However, the Claimants have made their own Application through CCom-286, which the Tribunal understands has been amended through CCom-288. It is the Claimants' Application that the Tribunal now addresses. As it stands today, the Claimants request the following relief: that the Tribunal, by means of a procedural order:

    a. "Admit **Annex A** to CCom-286 onto the record as the Claimants' response to RCom-345;"

    b. "Finally declare that the Parties may not disclose to any body external to the arbitral procedure (whether or not under seal) any materials or evidence adduced in this arbitration without express consent from the other Party or an order of the Tribunal derogating from this requirement, and order the Parties not to do so;" and

    c. "Find that the Respondent has not established a basis for derogating from its confidentiality obligations with respect to the use of the 263 documents listed in the index attached to RCom-335 in its domestic tax proceedings, and order the Respondent not to do so."[31]

29. The Respondent argues that the Claimants cannot request a final order on an Application that has been withdrawn.[32] However, the Tribunal understands the Claimants to be requesting relief from the Tribunal regardless of the Respondent's (now withdrawn) Application. What the Claimants want is to prevent the Respondent from adducing the Documents before the Delhi High Court without the Tribunal's permission.

30. The Claimants contend that the Respondent's withdrawal of its Application is an abuse of process designed to prevent the Tribunal from issuing a final order from the Tribunal on this matter, which the Claimants submit "is likely the only effective means to control this abuse and ensure the Respondent's compliance."[33] The Claimant further submit that their request for a final ruling is not a new application requiring fresh briefing, but refers to the same subject matter of the Respondent's application (namely, the content of the applicable confidentiality rules).[34]

31. The Respondent has objected to the Claimants' Application, as amended in CCom-288. In particular, the Respondent argues that CCom-288 contains a number of factual

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[31] CCom-288, ¶ 10.

[32] RCom-368, ¶ 5(a).

[33] CCom-286, ¶ 10.

[34] *Id.*, ¶ 12.

misrepresentations designed to mislead the Tribunal into granting an order on a withdrawn application, which the Claimants would then use to be able to represent to the Delhi High Court that the Tribunal is somehow opposed to the use of the Documents by the Court, "when all that has in fact happened is a provisional interpretation by the Tribunal of a former procedural order on confidentiality; and in circumstances where it is intrinsic in the approach delineated by the Tribunal in AT-272 that the Delhi High Court should be left free to reach its own decision as to the admissibility of the documents in these proceedings without interference either way by the Tribunal, on the basis that either Party can come back to the Tribunal if the documents are declared admissible in principle by the Delhi High Court (but prior to their being in fact adduced)."[35] The Respondent also explains that the withdrawal of its Application was motivated by the Tribunal's ruling on prematurity in AT-272, and is not an abuse of process.[36] The Respondent further denies that it is defying the Tribunal's authority, and argues that it was the Claimants who were defying the Tribunal's findings on prematurity in AT-272.[37]

32. The Respondent notes that relief requested by the Claimants differs from that sought in CCom-286, and argues that the Claimants have "drop[ped] all pretence: their clear and intended effect would be to prevent the Respondent once and for all from using the documents in the Indian proceedings", which "is not what the Tribunal intended in AT-272 and would constitute a direct and unwarranted interference with the processes of the Indian Courts". By contrast, "[t]he process which the Respondent proposes to follow – in direct compliance with AT-272, with the sole difference of leaving the onus on the Claimants to approach the Tribunal for an order restraining use at the relevant juncture – respects the authority of both the Delhi High Court and of the Tribunal, as intended by AT-272."[38]

33. The Tribunal accepts the Respondent's explanation that it has withdrawn its Application as a result of the Tribunal's findings on prematurity in AT-272, and accordingly does not consider it to be an abuse of process. However, it also finds that the Claimants' Application is a stand-alone application, and will now assess its merits. The Tribunal will address the Respondent's objections to this Application as needed in the sections that follow.

34. The Tribunal will address each sub-part of the Claimants' Application in the order it has been formulated.

B. The Claimants' request that the Tribunal admit Annex A to CCom-286 onto the record as the Claimants' response to RCom-345

35. The Claimants first request that the Tribunal admit Annex A to CCom-286 onto the record as the Claimants' response to RCom-345.

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[35] RCom-368, ¶ 2.

[36] RCom-365, ¶ 8.

[37] RCom-368, ¶ 2.

[38] *Id.*, ¶ 5(b).

36. As recorded in Section II above, RCom-345 was the Respondent's 16-page submission filed on 4 January 2019, which essentially constituted its reply to its Application. RCom-346 contained submissions on the Respondent's position on its Application (namely, whether it may disclose the Documents to the Delhi High Court), as well as submissions on merits issues. Annex A responds to the Respondent's submissions on its Application (specifically, on "whether the applicable procedural framework presumptively protects the documents from being disclosed and used outside of the legal proceeding in which they were produced […], and, if so, whether the Respondent can demonstrate that any exception to the basic rule is warranted in this case"[39]), but does not respond to the Respondent's merits submissions. Indeed, as recorded in para. 19.c above, all merits submissions made in the context of the Respondent's Application have been stricken from the record, and those parts of RCom-345 are therefore no longer in issue.

37. The Tribunal understands the Respondent to be arguing that the Claimants should not be able to file a response to a submission that formed part of a withdrawn application. This may be so, RCom-345 is already in the record, and to the extent that RCom-345 reflects the Respondent's position as to the disclosure of the Documents to the Delhi High Court, which is also the subject matter of the Claimants' Application, it is relevant to this Order.

38. The Tribunal is also mindful that in AT-272 it stated that "[t]he Claimants must be given an opportunity to respond" to RCom-345,[40] and that it would reconsider its provisional ruling at Section B of AT-272 after the Claimants had an opportunity to respond/rejoin to RCom-345.[41]

39. For these reasons, the Tribunal admits Annex A to CCom-286 as the Claimants' response to RCom-345. That being said, for present purposes the Tribunal will focus only on such parts of Annex A that are relevant to the present Order.

40. The Respondent has not requested an opportunity to respond to Annex A, and rightly so. As noted in para. A.2 of AT-272, "[t]he consistent procedure in this arbitration has been that each side has had an equal opportunity to make submissions on each matter. Thus, any reply by a party making an application must be followed by an opportunity for the other party to rejoin[.]" RCom-345 was the Respondent's reply to its Application, which means that the Respondent already had two opportunities to make submissions on that Application, and it is now for the Claimants to have the last word. As noted above, the fact that the Respondent has withdrawn its Application should not deprive the Claimants from the opportunity to respond to the Respondent's submissions in that Application, insofar as they are relevant to the Claimants' Application. Further, both Parties have had an equal opportunity to make separate submissions on the Claimants' Application, and as a result, both Parties' due process rights have been respected.

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[39] Annex A to CCom-286, ¶ 4.

[40] AT-272, ¶ A.2.

[41] AT-272, ¶ B.7.

C. The Claimants' request for a final declaration as to whether materials or evidence adduced in this arbitration can be disclosed to any body external to the arbitral procedure

41. The Claimants next request that the Tribunal "[f]inally declare that the Parties may not disclose to any body external to the arbitral procedure (whether or not under seal) any materials or evidence adduced in this arbitration without express consent from the other Party or an order of the Tribunal derogating from this requirement, and order the Parties not to do so[.]"[42]

42. This request deals squarely with the question raised by the Respondent's Application, namely, whether the Documents can be disclosed outside of this arbitration, including to a court of law, but is formulated more broadly (i.e., to encompass any documents submitted, produced or created in connection with this arbitration ("Arbitration Materials"[43]), not just the Documents, and with respect to any body external to the arbitral procedure, not just a court of law). The Tribunal considers that the Claimants' request for a final declaration of how the confidentiality regime in this arbitration should be interpreted is legitimate, and can be ruled upon despite the Respondent's withdrawal of its own application.

43. The Respondent has summarized its position on this question as follows (with the caveat that the Respondent has limited its arguments to the disclosure of the Documents to a court of law or another dispute resolution body):

    a. For the Respondent, "[t]here is an analytical distinction between (a) the confidentiality regime which a tribunal may put in place for an arbitration (the "arbitral confidentiality regime") and (b) the regime which governs the admission by a national court into its proceedings of documents which would otherwise be covered by that arbitral confidentiality regime."[44]

    b. As to the arbitral confidentiality regime (point (a)), the Respondent argues that "[p]roduction of the documents to a State Court would not amount to 'publication' of the same within the terms of Procedural Order No. 2"[45] According to the Respondent, "applying the Tribunal's own determinations and orders, Procedural Order no. 2 does not cover disclosure to another dispute resolution body (and all the more so to another dispute resolution body hearing a dispute between the exact same parties), as opposed to disclosure to the public at large. As recorded in para. 5 and 6 of Procedural Order no. 10, (i) the Respondent submitted, in the lead up to Procedural Order no. 10, that disclosure of documents from this arbitration into the *Vedanta* arbitration would require a variation to Procedural Order no. 2 (because the documents would otherwise be covered by the regime of Procedural Order no.

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[42] CCom-288, ¶ 10 (b).

[43] The Tribunal will refer to them in general as "Arbitration Materials", to distinguish them from the "Documents" that were the subject matter of the Respondent's Application.

[44] RCom-351.

[45] RCom-345, ¶ 6(b).

2); (ii) the Claimants submitted that it would not; and (iii) the Tribunal determined that it would not. Applying the Tribunal's own decision (*a fortiori* given the absence of any third party from the Delhi High Court proceedings), production of the abuse documents to the Delhi High Court does not engage Procedural Order no. 2 and does not require a variation thereto (and is in any event warranted as of right for the reasons set out in paragraph [b] above)."[46]

c. With respect to the regime which governs the admission by a national court into its proceedings of documents which would otherwise be covered by that arbitral confidentiality regime (point (b)), the Respondent argues that "the law in India (as in many other jurisdictions) is that the arbitral confidentiality regime will not stand in the way of use of the documents in court where disclosure is reasonably necessary for the protection of the legitimate interests of one of the disputing parties, to pursue a legal right or in the interests of justice. Steps will usually be taken by the court to protect disclosure to the public at large (i.e. beyond the disputing parties and the court), and the Respondent has consistently offered to request that such steps be taken in this case."[47] According to the Respondent, "[t]his is consistent with Dutch law"[48] (i.e., the law of the seat), under which it submits that it "is not constrained by any obligation of confidentiality, and it is free to produce the material before the Delhi High Court."[49]

d. The Claimants' subjective expectations that the Documents would not be disclosed to a court of law "are not supported by the law of the seat, nor by the laws of India (or indeed of the Claimants' home jurisdiction) which allow parties to arbitral proceedings to use material from the arbitration where the same is necessary to pursue a legal right before a court, or in the interests of justice."[50]

44. In turn, the Claimants' position can be summarized as follows:

a. With respect to the analytical distinction drawn by the Respondent, the Claimants submit that "[t]hat the legal regimes are distinct is precisely the reason why a decision by the Delhi High Court as to the admissibility of documents in those proceedings will not affect the Respondent's distinct obligations arising under the confidentiality regime applicable to documents submitted in this arbitration. Indeed, there is no question of a conflict between legal regimes, since a High Court ruling of admissibility would not impose a domestic law obligation to file the documents before the Delhi High Court, but rather simply grant the ITD leave to file the documents." [51]

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[46] RCom-351.

[47] RCom-351.

[48] RCom-351.

[49] RCom-345, ¶ 6(a).

[50] RCom-234, ¶ 6(c).

[51] CCom-280.

b. The applicable procedural framework does not permit the use of Arbitration Materials in separate proceedings, absent party consent or Tribunal permission. Specifically, the Claimants submit that:

i. PO2 prohibits the Parties from using Arbitration Materials outside of this arbitration. In their view, the term "publication" used at para. 59(c) of PO2 refers to any disclosure outside of this arbitration. They further allege that, until recently, the Respondent agreed with this position, as (i) it objected to the Claimants informing CIL of the Respondent's statements as to the release of dividend payments to CUHL, and (ii) objected to the disclosure before the Delhi High Court of any statements by the Parties in this arbitration.[52]

ii. Article 25(4) of the UNCITRAL Rules (which provides that "[h]earings shall be held in camera unless the parties agree otherwise") prevents the disclosure of direct testimony (whether in the form of witness statements, oral testimony in the transcript and factual exhibits). Citing S.*D. Myers*, the Claimants contend that "the Respondent is not allowed to adduce before any governmental body, including its courts, documents that 'effectively form part of the hearing' in this arbitration, and for purposes that are unrelated to the arbitration."[53] The Claimants further argue that Article 25(4) is mandatory and cannot be varied by the Tribunal.[54]

iii. The law of the seat gives effect to the Tribunals procedural orders and to the UNCITRAL Rules, and thus does not authorise the Respondent to disclose documents in violation of these orders and rules. In any event and citing PO2, the Claimants submit that the omission of any confidentiality rules in the Dutch Arbitration Act was deliberate, in order to allow the tribunals to fashion the most appropriate confidentiality regime. Accordingly, the parties do not have free license to disclose arbitral documents, but must seek guidance from the tribunal.[55]

c. The Respondent's reliance on paragraphs 5 and 6 of Procedural Order No. 10 to suggest that the Claimants and Tribunal previously took an opposite view is a distortion of the record. To the contrary, "consent was considered as a necessary prerequisite for documents to be shared between the proceedings, even where the confidentiality of sensitive documents was to be maintained vis-a-vis the rest of the world."[56]

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[52] Annex A to CCom-286, ¶ 6, referring to CCom-277 and Attachment B thereto, and RCom-79 and Procedural Order No. 7.

[53] *Id*., ¶ 10, citing *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Procedural Order No. 16 dated 13 May 2000, Exhibit RLA-24, ¶¶ 11-12.

[54] *Id*., ¶ 18.

[55] *Id*., ¶ 12.

[56] CCom-280.

d. As a result of the confidentiality regime put in place by PO2, the Claimants had a reasonable expectation that any Arbitration Materials would not be disclosed or used for other purposes in unrelated proceedings.[57]

45. On this basis, the Tribunal now issues its final ruling on this matter.

46. First, with respect to the analytical distinction drawn by the Respondent, as it already noted in AT-272, the Tribunal agrees with the Respondent that it is for the Delhi High Court to determine what documents are admissible in its own proceedings. However, it is for this Tribunal to determine whether any Arbitration Materials may be disclosed outside of this arbitration. That determination will depend on the applicable procedural framework, to which the Tribunal turns next.

47. Second, having now considered the Parties' detailed positions, the Tribunal confirms its provisional ruling in AT-272 that the applicable procedural framework (and in particular, para. 59(c) of PO2) prevents the Parties from disclosing to any third party (including a court of law) any Arbitration Materials without express consent from the other Party or an order of the Tribunal derogating from PO2.

48. Pursuant to para. 7.1 of the Terms of Appointment, this proceeding is governed by (i) the Terms of Appointment, Procedural Order No. 1 and any amendments; (ii) the UNCITRAL Arbitration Rules (1976), and (iii) with respect to matters not dealt with in these instruments, by the agreement of the parties or, absent agreement, the Tribunal's procedural orders. While not expressly stated in the Terms of Appointment, these proceedings are also governed by the mandatory rules of the *lex arbitri*, i.e. the Dutch Arbitration Act contained in the Dutch Code of Civil Procedure (Article 1(2) of the UNCITRAL Rules).

49. As noted in PO2, there are few rules governing transparency or confidentiality in the UNCITRAL Rules, and no rule (let alone a mandatory one) in the Dutch Arbitration Act. Absent a mandatory rule of the seat, or a rule in the instruments noted in the preceding paragraph, or an agreement of the Parties, it is for the Tribunal to set out the regime on confidentiality and transparency that it considers appropriate, subject to the UNCITRAL Rules and in particular Article 15(1). The Tribunal exercised this power in PO2, which sets out the applicable regime on transparency and confidentiality in this arbitration.

50. PO2 is binding on the Parties. This flows from para. 7.1 of the ToA, and Articles 1 and 15(1) of the UNCITRAL Rules.

51. Whether either of the Parties can disclose materials or evidence adduced in this arbitration to anybody external to these proceedings will thus depend on the terms of PO2. At para. 59(c) of PO2, the Tribunal:

> "ORDER[ED] that neither Party shall make public, in part or in whole, any other document submitted, produced or created in connection with this proceeding, including but not limited to procedural correspondence, the

[57] *Id.*, ¶¶ 13-15.

> Notice of Dispute, the Notice of Arbitration, the Statement of Claim, the Statement of Defence, any other written submissions by the Parties, any transcripts of hearings, any and all witness statements, expert reports, or documentary exhibits."

52. The Parties do not dispute that Arbitration Materials cannot be "made public". What they disagree on is whether submitting Arbitration Materials to a different tribunal or court of law in the pursuit of a legal right would qualify as making these materials "public" and would thus violate PO2.

53. The Respondent denies that adducing the Documents in the Delhi High Court proceedings would entail their "publication" (in particular if measures to protect their confidentiality are adopted). By contrast, the Claimants assert that the applicable procedural framework does not permit the use of Arbitration Materials in separate proceedings, absent party consent or Tribunal permission.

54. The Tribunal recalls that PO2 was issued mainly in response to the Respondent's application for a transparency regime.[58] In other words, one of PO2's main objectives was to deal with the disclosure of the Arbitration Materials to the general public. However, the Tribunal also requested the Parties to make submissions on confidentiality.[59] Accordingly, PO2 "addresse[d] the transparency and confidentiality regime to be adopted in this arbitration."[60] The reference to "publication" set out at para. 59(c) of PO2 should thus be interpreted in that context. In the Tribunal's understanding, the prohibition at para. 59(c) of PO2 should thus be interpreted to refer to any disclosure of Arbitration Materials outside of this arbitration.

55. This conclusion is supported by the fact that, at the time, the question of disclosure to other courts was already present. Indeed, one of the reasons why the Respondent wanted to implement a transparency regime was to allow disclosures to the *Vedanta* tribunal. In PO2, the Tribunal ruled that the two questions were different, noting that transparency to the general public was not the most appropriate way to mitigate the risk of contradictory decisions, and that this would be best dealt with through disclosures to and from the *Vedanta* arbitration.[61] These considerations were repeated in Procedural Order No. 10, ("PO10"), where the Tribunal endeavoured to put in place a document sharing regime between the *Cairn* and *Vedanta* arbitrations.[62]

56. The Respondent has argued that PO10 supports its view that disclosures to other dispute resolution bodies are allowed under PO2. It is true that PO10 allowed specific disclosures of documents between the two arbitrations, but this regime was put in place with both Parties' consent and with the specific objective of mitigating the risk of contradictory decisions in these two cases. And while the Tribunal did say that it "d[id] not consider

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[58] PO2, Section I.

[59] *Ibid*.

[60] PO2, ¶ 8.

[61] PO2, ¶ 55,

[62] PO10, ¶¶ 4, 6.

that putting in place such a regime require[d] an amendment to the rules on transparency or confidentiality set out in PO2", it expressly stated that "it might require a derogation therefrom, partial in its object and limited as to its beneficiaries, to Vedanta and the *Vedanta* tribunal".[63] In other words, the Tribunal found that it was unnecessary to modify a general regime of transparency and confidentiality to allow disclosures to specific third parties; this would be more efficiently dealt with by providing for exceptions to the rules in PO2 for the specific third parties to which disclosure would be allowed.

57. Finally, the prohibition at para. 59(c) of PO2 must also be interpreted in light of Article 25(4) of the UNCITRAL Rules, which provides that "[h]earings shall be held *in camera* unless the parties agree otherwise". This provision has been interpreted to prevent the disclosure of hearing transcripts, but the Tribunal agrees with the Claimants that it should also cover witness statements that would have been delivered at a hearing, were it not for the (now usual) procedure in international arbitration that direct evidence is submitted in writing prior to the hearing. This prohibition should also cover factual exhibits submitted by the witness in support of his/her testimony and documents used in his/her cross-examination, unless those documents are separately part of the record, or accessible to the Party who did not present the witness prior to receiving the witness statement, or otherwise in the public domain.

58. The Tribunal thus finds that the Parties may not disclose any Arbitration Materials to any body external to the arbitral procedure without express consent from the other Party or an order of the Tribunal derogating from this requirement. This extends to the disclosure of documents under seal because, once they are submitted to another body, even under seal, the Arbitration Materials will effectively be under the control of that body, and a subsequent order from the Tribunal declaring that they cannot be submitted would thus be rendered moot. For the avoidance of doubt, the Tribunal considers that the form in which the Respondent currently plans to produce the Documents to the Delhi High Court (i.e., under seal together with its application for the Documents to be admitted) would not comply with this ruling.

59. That being said, the Tribunal emphasizes that this prohibition does not mean that the Parties may never submit Arbitration Materials to another dispute resolution body. It simply means that, to do so, that Party requires the other Party's consent or the Tribunal's permission. Whether a Party consents or not is for that Party to decide; but the Tribunal will take very seriously an application by a Party to submit Arbitration Materials to another tribunal or court of law when it finds that such Party has a legitimate interest in pursuing a legal right or fulfilling a legal duty. In this respect, the Tribunal notes that Article 3(13) of the IBA Rules on the Taking of Evidence (2010) (from which the Tribunal may seek guidance, but is not bound by[64]) provides as follows:

> "Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in

[63] PO10, ¶ 20.

[64] PO1, ¶ 9.1.

> connection with the arbitration. ***This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority***. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration." (Emphasis added).

60. Finally, on this point, the Tribunal wishes to stress that it has formed no view, one way or the other, as to whether it would grant an application for leave to produce Arbitration Materials to the Delhi High Court. Accordingly, upon application by the Party seeking to adduce Arbitration Materials to that court or indeed any other court or tribunal, the Tribunal will duly consider whether such disclosure is warranted, within the limits of Article 25(4) of the UNCITRAL Rules.

D. The Claimants' request that the Tribunal find that the Respondent has not established a basis for derogating from its confidentiality obligations with respect to the Documents

61. Finally, the Claimants request that the Tribunal "[f]ind that the Respondent has not established a basis for derogating from its confidentiality obligations with respect to the use of the 263 documents listed in the index attached to RCom-335 in its domestic tax proceedings, and order the Respondent not to do so." [65]

62. The Tribunal will not consider this request at the present stage, for the following reasons.

63. First, in AT-272 the Tribunal found that the Respondent's Application was premature. Indeed, if the Delhi High Court does not admit the Documents into its proceedings, then the Respondent's Application will have been moot and the Parties and the Tribunal would have spent time and resources on an unnecessary application. Accordingly, for reasons of procedural economy, the Tribunal found that the appropriate sequence of steps would be for the Respondent to first apply to the Delhi High Court for permission to admit the Documents, without adducing them, and only once the Delhi High Court had declared them admissible, seek this Tribunal's permission to adduce them.

64. Second, as a result of this ruling, the Respondent withdrew its Application. There is therefore no specific request before this Tribunal for a derogation from PO2 in order to disclose any Arbitration Materials to an external body.

65. Third, the Respondent has confirmed that it intends to comply with the sequence of steps laid out in AT-272, albeit with the reservation outlined at para. 23 above. Despite this reservation, as a result of the Tribunal's ruling in Section III.C above, the Tribunal expects the Respondent to seek its permission before producing the Documents to the Delhi High Court, whether under seal or not. The Tribunal also expects the Respondent to inform the Delhi High Court of the confidentiality regime of this arbitration when it makes its application to adduce the Documents, if necessary by submitting a copy of PO2 and of this Order, for which a derogation of PO2 is hereby granted. However, the

[65] *Id.*, ¶ 10.

Tribunal sees no reason to doubt the Respondent's intention to comply with its binding orders, and will thus stop short from ruling on whether a derogation from PO2 is warranted unless and until the Respondent applies for that derogation, or the circumstances of the case require the Tribunal to adopt a different solution.

IV. ORDER

66. For the reasons set out above, the Tribunal:

a. Admits Annex A to CCom-286 onto the record as the Claimants' response to RCom-345;

b. Finally declares that the Parties may not disclose to anybody external to the arbitral procedure (whether or not under seal) any materials or evidence adduced, created or produced in this arbitration without express consent from the other Party or an order of the Tribunal derogating from this requirement, and orders the Parties not to do so;

c. Reserves its decision as to whether the Respondent has established a basis for derogating from Procedural Order No. 2 with respect to the use of the 263 documents listed in the index attached to RCom-335 in its domestic tax proceedings;

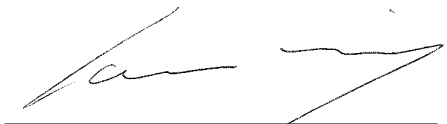
d. Allows the Respondent to submit a copy of this Order, as well as a copy of Procedural Order No. 2, to the Delhi High Court.

67. The Tribunal defers its decision on costs to a later stage.

Seat of arbitration: The Hague, Netherlands

Date: 18 March 2019

For the Arbitral Tribunal:



Dr. Laurent Lévy
Presiding Arbitrator